

ous contract, but an onerous contract for what? If it is an onerous contract for the payment of wages or commission which are chargeable to revenue account in the plainest possible way, and if that is the onerous contract that you are getting rid of, it is impossible to suggest that that is a reason for saying that this is a capital expenditure unless you get rid of that onerous contract (as I pointed out just now) by erecting in its place a capital asset in the nature of — of course I am only using this as an illustrative example — a labour-saving machine which gives you an asset and so dispenses with the expense of labour. But to say that it is a capital expenditure because it secured an enduring benefit by getting rid of an onerous contract is not to state the material thing, and it is completely inconclusive.

....

This sum of £300,000 with which this case deals, upon the fact of this case, appears to me to represent nothing at all but the lump sum representing the future emoluments of the agent which are being redeemed (if I may use that expression, as it has been used before) by that arrangement."

I do not think it can be disputed in the appeal before me that the compensation payments were made in the course or conduct of the appellant's business. What has been denied by the respondent is that these payments were disbursed wholly and exclusively for the production of its income within the meaning of section 14(1) of the Ordinance. It was urged by counsel for the respondent that as the payments were made to the agents only after the disposal of parts of the whole estate the payments were not made for the production of any income from these parts but on the contrary were in fact for the cessation of income from those portions of the estate which had been disposed of. I must say I find it somewhat difficult to understand the force of this argument. I do not think it is possible to separate the parts from the whole for it was obvious and was admitted even by Revenue that the company ran all the plantations as a single commercial undertaking. I do not think it can be disputed that the sale of the estates was no more than an incident in the conduct of the whole undertaking the object of which was to make the appellant's commercial undertaking a more profitable proposition. The payments by way of compensation resulting as a matter of legal obligation from the sale must of necessity, in my view, be regarded as a matter of commercial expediency and attributable to the whole venture which was carried out for the production of income. They were made in order indirectly to facilitate the carrying on of the business and were accordingly incurred wholly and exclusively in the production of income. I am of the view that the Special Commissioners were wrong in their finding on this score.

On the persuasive authority of the Scottish Court of Sessions case of *Vallambrosa Rubber Co. Ltd. v. Farmer (Surveyor of Taxes)*,⁽⁷⁾ it is, I think, clear that the expenses sought to be deducted need not be referable to the profits of a particular year. The Lord President in that case at page 534 had this to say:—

"The Junior Counsel for the Crown, encouraged by certain expressions which he found used by various learned judges who had given judgments in Tax Cases, wished your Lordships to accept this proposition, that nothing ever could be deducted as an expense unless that expense was purely and solely referable to a profit which was reaped within the year.

I think the proposition only needs to be stated to be upset by its own absurdity. Because what does it come to? It would mean this, that if your business is connected with a fruit which is not always ready precisely within the year of

A assessment you would never be allowed to deduct the necessary expenses without which you could not raise that fruit."

Although the point was not specifically relied upon in the appeal by Revenue counsel, I do not think it can be questioned that a single lump sum payment eliminating the necessity of recurrent payments is a deductible expense. If any authority for this is required one need only look to *J.P. Hancock (Surveyor of Taxes) v. General Reversionary and Investment Co., Ltd.*,⁽⁸⁾ where Lush J. said at page 372:—

"It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payments alters the character of the expenditure, as it would be to hold that, if an employer were under a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay."

Counsel for Revenue tried to distinguish the facts in the *Anglo-Persian Oil Company* case and in *Hancock's* case on the ground that in these cases the deductions were allowed because the company in each instance was trying to rid itself of an onerous liability. I do not think this distinction valid in this case.

In the result, I am of the view that if the Special Commissioners had properly instructed themselves in the law they would have reached the conclusion that the expenditure of \$405,334 by the appellant by way of compensation for loss of earnings or commission to its London and Eastern Agents was deductible under the provisions of section 14(1) of the Ordinance. I therefore hold that the said expenditure is deductible for income tax purposes and direct that the assessment for the year of assessment 1967 be amended accordingly.

This appeal is allowed with costs.

F Appeal allowed.

Solicitors: Skrine & Co.

HUSDI v. PUBLIC PROSECUTOR

[O.Cr.J. (Syed Othman F.J.) April 27, 1979]

G [Kuala Lumpur — Criminal Revision No. 9 of 1978]

Criminal Law and Procedure — Statements made in course of police investigations — Whether accused entitled to copies of such statements — Whether public documents — Statements absolutely privileged — Evidence Act, 1950, ss. 74, 76, 78 & 145 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 108A, 112 & 113.

H *Evidence — Whether statements made in the course of police investigation are public documents — Evidence Act, 1950, ss. 74 & 76.*

In this case the accused had been charged with the offence of house breaking by night. His counsel applied for copies of the cautioned statement made by the accused to the police and of the statements recorded by the police from witnesses in the course of investigation. The application was refused by the Deputy Public Prosecutor and application was made to the High Court. When the matter came up for hearing, only the application for the statements made in the course of police investigations was pursued, as it had been held in *Khoo Siew Bee v. Ketua Polis Kuala Lumpur*⁽¹⁾ that an accused person is entitled as of right to a copy of his cautioned statement.

Held: (1) the right of an accused person to the first information report is nothing more but a consequence of his right to be informed as soon as may be of the grounds of his arrest, under Article 5(3) of the Constitution and this Article

is an offshoot of the common law;

(2) on the other hand, the right to inspect a statement to the police made in the course of police investigations, which is a statutory, not a common law, creature, would depend on the construction of the relevant statutory provisions, particularly those under the Criminal Procedure Code. There is no provision in the Criminal Procedure Code or the Evidence Act, which is construable as giving a right to inspect such a statement;

(3) the statement made to the police in the course of a police investigation is a privileged document and there can therefore be no right to inspect such a document. Further as a matter of public policy it is undesirable for the prosecution to supply the defence with the police statements, as there is a real danger of tampering with witnesses.

Cases referred to:-

- (1) *Khoo Siew Bee & Anor. v. Ketua Polis, Kuala Lumpur* [1979] 2 M.L.J. 49.
- (2) *Anthony Gomez v. Ketua Polis Daerah, Kuantan* [1977] 2 M.L.J. 24.
- (3) *Mutter v. Eastern and Midlands Railway Co.* L.R. 38 Ch. D. 92.
- (4) *Bryant and Dickson* (1946) 31 Cr. App. 146, 151.
- (5) *Meethuram Dass v. Jagannath Dass* I.L.R. 28 Cal. 794.
- (6) *Dawkins v. Lord Rokeby* (1875) L.R. 7 H.L. 744.
- (7) *Martin Rhienus v. Sher Singh* [1949] M.L.J. 201.

CRIMINAL REVISION.

Sri Ram for the applicant.

Mohamed Shafee bin Mohamed Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Othman F.J.: The petitioner was charged with another in the Sessions Court at Kuala Lumpur with offences of house breaking by night under section 457 of the Penal Code. He first appeared before the court in September 1978. He engaged counsel in October 1978 who then applied to the Deputy Public Prosecutor for copies of the cautioned statement made by the petitioner to the police and of the statements recorded by the police from witnesses in the course of investigation (which for brevity I shall call police statements). The Deputy Public Prosecutor denied the request. When the case came up on October 25, 1978, counsel applied to the court for an order directing the prosecution to supply the petitioner with copies of the statements. The learned President dismissed the application. The petitioner now seeks revision of the dismissal.

Before me, the petitioner only pursues the application for copies of police statements. The application for the cautioned statement has been withdrawn as on the day of hearing the arguments, I indicated that the Lord President was dealing with a similar application in another criminal case and would be giving his opinion soon. The Lord President has now given his judgment. In *Khoo Siew Bee & Anor. v. Ketua Polis, Kuala Lumpur*⁽¹⁾ Suffian L.P. has ruled that an accused person is entitled as of right to a copy of his cautioned statement.

For the contention that in a summary trial before the subordinate courts the accused person is entitled to be supplied by the prosecution with copies of police statements, Encik Sri Ram, for the petitioners, mainly relies on *Anthony Gomez v. Ketua Polis Daerah, Kuantan*⁽²⁾ where at page 26 Suffian L.P. said:

A "... 'though our section 76' (of the Evidence Ordinance) 'is silent as to the right of the applicant to inspect the first information report in question, it is clear that under the common law he has that right, as he is a person interested in it and inspection is necessary for the protection of his interest'."

The learned Lord President came to this conclusion after discussing an English authority and some Indian authorities. In the English authority *Mutter v. Eastern and Midlands Railway Co.*⁽³⁾ Lindley L.J. at page 106 said:

B "When the right to inspect and take a copy is expressly conferred by statute, the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle..."

C The question to consider is whether a police statement is a public document which an accused person has a right to inspect at common law or by statute. The relevant provisions mainly referred to are those in the Evidence Act. Section 74 of the Evidence Act (Revised Act 56) is related to section 76. These two sections read as follows:

"74. The following documents are public documents:

- (a) documents forming the acts or records of the acts of
 - (i) the sovereign authority;
 - (ii) official bodies and tribunals; and
 - (iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; and
- (b) public records kept in Malaysia of private documents.

76. Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is authorised by law to make use of a seal, and the copies so certified shall be called certified copies."

F Encik Sri Ram argues that on the principle indicated by the learned Lord President in *Gomez's* case, *supra*, an accused person is entitled to any document in the hands of the prosecution if it is shown he has an interest in it and inspection is necessary for the protection of his interest; and police statements are no less necessary to an accused person to protect his interest than the first information or report. In view of this argument, I have to go deeper into the nature of a first information or report.

G I am of the view that the common law right of an accused to inspect the first information arises from the duty of the police to inform the accused the reason for his arrest, so as to enable the accused, if he so wishes, to explain his conduct as alleged in the first information, which, on the face of it, constitutes an offence. Thus for an example: a woman lodges an information alleging that A has raped her. By showing or supplying A with the first information, he is given the opportunity to explain the circumstances; he may show that there was in fact no rape and the woman consented to the whole thing. Similarly, if he is accused of murder in a first information, he may explain that he was elsewhere at the time or show circumstances that the act was an accident. Now if

A did not see the information, he would not be able to vindicate himself or to meet with the various particulars alleged in the first information. Looking at the matter from all aspects, supplying the arrested person with the first information has all the advantages to everyone concerned. It gives the accused person the first opportunity to explain. If his explanation is satisfactory, it may shorten investigation and cut down public expense. Even if it is unsatisfactory, it will give the police officer better leads in his investigation.

Further, it is a notorious fact that the police in accident cases do supply a copy of the first information or report on payment of a prescribed fee and the copy is invariably certified by the O.C.P.D. following the requirements of section 76. On this consideration, I do not think that the police should pick and choose cases in which they would supply a report. If in these accident cases, they have made it a practice to supply the reports, not only to the maker but also to other persons affected, I can see no reason which justifies them to withhold the supply of a first information to an accused person in the more serious cases which affect his liberty. Furthermore, a first information need not necessarily be to the police. It can be made to the Magistrate, who in most cases would refer it to the police for investigation. Magistrate Courts do supply copy of the first information (which is called complaint) on request as a matter of course. I cannot see why a first information should be treated any different when made to the police.

Apart from the above, there is the constitutional aspect to be considered. I am of the view that the right to an accused person to the first information is nothing more but a consequence of his right to be informed as soon as may be of the grounds of his arrest under Article 5(3) of the Constitution, and this Article is an offshoot of the common law. The police, when making an arrest, can do no better to protect themselves from the accusation of making a false arrest by informing the accused person of the grounds of his arrest as required by the constitutional provision in accordance with the first information.

A police statement does not have the same features as a first information. Criminal investigating, as far as I am aware, is not a process which can be said to be rooted from common law. The powers of the police to investigate into an offence are conferred, not by common law, but by statute law, i.e. the Criminal Procedure Code. Section 112(i) of the Criminal Procedure Code provides that any police officer making a police investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined. By sub-section (ii) of the same section, such person shall be bound to answer all questions relating to such case put to him by such officer. Sub-section (iii) binds him to state the truth. If not for these provisions, he does not have to speak out to the police about the circumstances of the case. A police statement is therefore a requirement of written law.

On the face of it, a police statement falls under section 74 of the Evidence Act, as it is a document

forming the act of a public officer. Simply because a document is the act of a public officer does not give a person, interested or otherwise, a right to inspect. Section 76 of the Evidence Act merely relates to the manner of certification. It is not an enactment which confers any right. It presupposes the existence of the right to inspect. The opening part of the section reads "Every public officer having the custody of a public document which any person has a right to inspect..." The right to inspect a police statement, which is a statutory, not common law, creature, would depend on the construction of the relevant provisions, particularly those under the Criminal Procedure Code.

The purpose of the police officer taking these statements is merely to collate evidence relating to circumstances surrounding the offence alleged in the first information, and also to determine whether or not there is sufficient or further evidence to prosecute the accused person. On completion of investigation the investigating officer is required by law to report to the public prosecutor. See section 120 Criminal Procedure Code. On the first information, police statements and other evidence, the Public Prosecutor decides whether or not to prosecute. By the very nature of the actions taken, police statements belong to a special class. Considering it under the Evidence Act, it does not come under section 78 which sets out the mode of the proof of every public document prescribed therein. Neither does it fall under section 79 which relates to presumption as to genuineness of certified copies, nor under section 80 which relates to presumption as to documents produced as evidence. And it must be noted that even if such a statement is to be used for impeachment, it must be proved, unless the witness to be impeached admits to having made such statement. See section 145 of the Evidence Act. A first information is admissible on production. See section 108A Criminal Procedure Code. Section 77 of the Evidence Act, as I see it, relates only to a public document where any person has the right to inspect.

Considering the provisions in the Criminal Procedure Code and the Evidence Act, I can find no provision which is construable as giving a right to inspect a police statement.

To go further, there is *Bryant and Dickson*.⁽⁴⁾ Towards the end of his judgment in *Kho Siew Bee & Anor. v. Ketua Polis, Kuala Lumpur*, *supra*, Suffian L.P. said:

"Be it noted that my ruling only applies to statements recorded from the accused, not from others who are potential witnesses against or for them — as to which the prosecution is under no duty to supply to the defence, *Bryant and Dickson*."

The learned Lord President's ruling appears to apply to a statement by an accused whether or not he is under caution. I am of the view that this must be so, because the accused's statement is part of his case, whether or not the prosecution accepts or intends to use it. It will be a matter for the court whether or not to accept it as evidence. An uncautioned statement does not appear to be admissible or usable. See Section 113 Criminal Procedure Code.

Goddard L.C.J. in *Bryant's* case, *supra*, dealing

with the question whether it was the duty of the prosecution to have supplied the defence with a statement which a prosecution witness had admittedly made to the prosecution, said:

"Another point taken is that Campbell was not called at the trial. It is said that it was the duty of the prosecution to have supplied the defence with a statement which Campbell had admittedly made to the prosecution. The prosecution for reasons which one can well understand, did not call Campbell. Is there a duty in such circumstances on the prosecution to supply a copy of the statement which they have taken to the defence? In the opinion of the court there is no such duty, nor has there ever been. In the first place, if they had supplied a copy of the statement of Campbell, that would not have enabled the defence to put the statement in. The statement which Campbell made could have become evidence only if he had been called as a witness. But it is said that it was the duty of the prosecution to put that statement at the disposal of the defence. In the opinion of the court, the duty of the prosecution in such a case is to make available to the defence a witness whom the prosecution know can, if he is called, give material evidence. That they did in this case, because when a letter was sent by the defence to the Director of Public Prosecutions, the reply of the Director of Public Prosecutions showed quite clearly that the prosecution did not intend to call him, but he added: 'There is no objection to your taking a statement from Campbell if you wish to do so'. That was said well before the trial. It was said after the close of the police court proceedings, when the defence knew that Campbell was not being called by the prosecution, and therefore could quite well themselves have gone to Campbell and taken a statement from him. Campbell was at the court. Who brought him to the court I do not know, nor is it material to inquire, but the defence could have called him if they had liked. No doubt Mr. Scott Henderson would not have been so unwise as to call him without having a statement from him, but if the defence did not choose to take a statement and find out what he was prepared to say, that is not a matter with which the prosecution are concerned. In the opinion of the court it is quite wrong to say that it was the duty of the prosecution in these circumstances, having made Campbell available to the defence as a witness if they wished to call him, to go further and produce the statement which he had made."

So far as applicable to the present case, the principle that appears to be laid down in this case is that it is the function of the prosecution and the defence to prepare their own case; but the defence is not entitled to the police statement, as they themselves may record a statement from a prosecution witness if they so desire. The last part is merely a reiteration of the principle that there is no property to a witness — not to a document generally, as attempted to be extended by the petitioner's side.

In India, the law relating to the powers of the police in investigation is about the same as ours. But it should be noted that in the Indian Criminal Procedure Code there is no provision equivalent to our section 112(iii) which in effect says that a person making a police statement shall be legally bound to state the truth. *Sohoni's* The Code of Criminal Procedure (16th Edition) Volume 1, at page 796 reads:

"A refusal to answer questions asked by a police officer under this section' (section 161) 'is not punishable under section 176, section 179 or section 187, I.P.C., as under the present Code' (1898) 'there is no obligation to speak the truth as there was under the 1882 Code'."

A It was decided there in *Methuram Dass v. Jagannath Dass*⁽⁵⁾ that a statement made in the course of police investigation was absolutely privileged. At page 797 the court said:

B "In the present case the investigation was required by law; it was conducted under the provisions of the law, it was ancillary to the administration of justice. The defendant was bound by law to answer all questions put to him by the police officer conducting the investigation, and was punishable if he answered untruthfully and what was said by him had reference to the matter under investigation. Virtually the only distinction between his position and that of an ordinary witness arises from the fact that his statement was not made in a court of justice, and we see no reason accordingly, to use the language of the Lord Chief Baron cited above, — that was in the case of *Dawkins v. Lord Rokeby*⁽⁶⁾ — 'why public policy should not equally prevent an action being brought against him as against a witness in an ordinary court of justice'."

C What should be noted in the above passage is that part of the first sentence which says that the investigation was required by law, i.e. written law. This covers the act of recording a police statement. But it should be observed that the statement that it was punishable if a person making a police statement answered untruthfully, appears to be in conflict with the provisions of the Indian Criminal Procedure Code in force at the time. This case was decided in 1901, when under the 1898 Indian Code there is no obligation to speak the truth to the police as indicated by *Sohoni* and cited above. But, for the purpose of the present case, we are only concerned with the ruling that a police statement is a privileged document. The Court of Appeal here has followed the Indian decision. In *Martin Rhiernus v. Sher Singh*⁽⁷⁾ Willan C.J. after citing the above passage at page 203 said: "I agree with that decision and the reasoning for it."

F The question was raised by the court whether the provisions of section 113 of the Criminal Procedure Code prevent a statement made under section 112 from being given in evidence at all, even in civil proceedings, but having decided that statements made under section 112 are absolutely privileged it is not necessary for me to decide this further question. Nor, having found that the statement in this case was made under section 112 it is necessary to decide whether information to the police under section 107 is, or is not, absolutely privileged."

G These two cases involve actions for defamation. But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect. Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses.

H For the foregoing reasons, in the circumstances shown in the present application, the defence is not entitled to be supplied with police statements.

Application dismissed.

Order accordingly.

Solicitors: Sri Ram, Chan & Chia.

I